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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MUOI THI CHAU, Plaintiff and Respondent, v. KATHLEEN CHAU, Defendant and Appellant.	G039715 (Super. Ct. No. 06CC07974) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Steven L. Perk, Judge. Affirmed.

Law Office of Thomas Pham, Jr., and David P. Nguyen for Defendant and Appellant.

Blue Capital Law Group, Bryan L. Ngo, Mary Xinh Nguyen, and Stephen J. Yang for Plaintiff and Respondent.

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After a bench trial, the court entered judgment in favor of plaintiff Muoi Thi Chau on her causes of action for breach of contract and money lent against her sister, defendant Kathleen Chau. Defendant appeals, arguing the judgment lacks "legal basis" because no contract existed between the parties and plaintiff did not lend defendant any money. In other words, defendant contends insufficient evidence supports the judgment. We affirm.

FACTS

Plaintiff is defendant's older sister. In May 1995, plaintiff (then unemployed) and her husband (who had a bakery and florist license) opened a business called the Claus Bakery. They paid for their start-up expenses with credit cards and $15,000 that plaintiff's husband had received from his employer. Plaintiff testified defendant made no financial contributions to the business. Defendant testified to the contrary, claiming she spent about $50,000 to buy ovens, refrigerators and freezers for the business. (At that time, defendant was 31 years old and had been working at the post office for seven years; her husband worked at Boeing.) Because plaintiff lacked good credit, was unemployed with children, and feared she would not qualify for Medi-Cal, she asked defendant to co-sign the lease. In return, plaintiff allowed defendant to take the related tax deduction for business expenses. Due to plaintiff's credit problems, defendant opened a bank account for the business under defendant's name. Defendant did not "participate in the business of the bakery and florist shop."

Ten years later, plaintiff sold the business for $50,000. After deducting back rent and other payments owed, plaintiff was to receive net proceeds of $43,081.67.

According to plaintiff, because she had no bank account, she asked defendant to accompany her to the escrow company to pick up the check. Plaintiff asked

defendant to cash the check and to give plaintiff the money within two weeks. But when they arrived at the escrow company, the check had been issued in plaintiff's name. The escrow company agreed to re-issue the check in defendant's name only if plaintiff gave them a written authorization to do so. Because plaintiff "was very busy," defendant wrote an authorization to the escrow officer stating that plaintiff was repaying defendant's loan to her. Plaintiff copied this authorization in her own handwriting. The escrow company then issued a check in defendant's name for $43,081.67. A week later, plaintiff asked defendant for the money. Defendant replied, "Go and sue me." Plaintiff repeatedly asked defendant for the money, but defendant refused.

Plaintiff sued defendant for breach of contract, money lent, account stated, and open book account. As to the breach of contract cause of action, plaintiff alleged (1) she lent defendant $43,081.67 from the sales proceeds of a business, and (2) defendant promised to repay plaintiff the money on demand but failed to do so after plaintiff demanded repayment. Plaintiff repeated those allegations with respect to the money lent cause of action with the additional assertion that interest was owed at 10 percent per annum.

After the close of testimony, defense counsel moved for nonsuit[1] and dismissal of all causes of action on the basis plaintiff had failed to prove the elements of

[1] A motion for "nonsuit" at the close of all evidence is a misnomer on several levels. First, a motion for nonsuit is only appropriate after the opening statement or after the presentation of plaintiff's evidence in a *jury* trial. (Code Civ. Proc., § 581c, subd. (a).) The related motion in a bench trial is a motion for judgment pursuant to Code of Civil Procedure section 631.8, subdivision (a) following the completion of plaintiff's evidence. A judge may weigh the evidence when deciding a motion under section 631.8, but not when deciding a motion for nonsuit. (See Code Civ. Procedure, § 631.8, subd. (a) ["The court as trier of facts shall weigh the evidence"]; 7 Witkin, Cal. Procedure (5th ed. 2008) Trial, § 409, p. 481 ["In ruling on the motion [for nonsuit], the court does not consider the credibility of witnesses but gives to the evidence of the party against whom it is directed all its legal value, indulges every legitimate inference from the evidence in favor of that party, and disregards conflicting evidence"].) And it makes no sense at all to move for "nonsuit" at the close of all of the evidence in a bench trial. The arguments

her claims. The court granted the motion as to the open book account and account stated causes of action. It denied the motion as to the breach of contract and money lent causes of action, finding sufficient evidence to support those claims.

The court found that neither side was "telling the real truth." It found plaintiff did not deposit the sales proceeds into her own bank account because she was applying for public assistance at the time and the presence of over $43,000 in her account would jeopardize her application. The court found the sisters therefore agreed that defendant would hold the money for plaintiff and repay it whenever asked, less $14,000 for three pieces of equipment (refrigerator, oven and walk-in cooler) defendant bought to start up the business. The court ruled defendant was to return to plaintiff "the difference, which is $29,081.67" plus prejudgment interest.

DISCUSSION

Defendant contends the court erred by denying her motion for nonsuit on plaintiff's breach of contract and money lent causes of action because plaintiff failed to "prove[] any elements of those two causes of action." Defendant argues there "were . . . no facts to state that a contract was entered as alleged by plaintiff in the complaint," and, in "fact, Plaintiff admitted during trial . . . that there was not any contract between Plaintiff and Defendant whereby Plaintiff lent Defendant money." Defendant focuses on (1) the complaint's allegation in the breach of contract cause of action that plaintiff "agreed to *loan* defendant . . . $43,081.67 from the sales proceeds of the business" (emphasis added); (2) plaintiff's trial testimony that she did *not loan*

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would be no different than if made as part of the final argument on the merits. Nevertheless, because counsel and the court referred to defendant's motion at the close of plaintiff's evidence and again at the close of all evidence as a motion for "nonsuit," we will continue to use that terminology in describing the trial court proceedings.

defendant the money, but rather, defendant "kept" or "h[e]ld" the money for plaintiff; and (3) plaintiff's written statement to the escrow company that she owed defendant the money. Defendant asserts "the law of contract as indicated in the California Civil Jury Instructions . . . required elements of offer, acceptance, consideration, condition, damages." (This reference to the "California Civil Jury Instructions," without even specifying *which* one, is the only citation in plaintiff's brief to any legal authority; in addition, her factual recitation contains no record references.)

Under the substantial evidence standard of review, "we must consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the judgment. [Citations.] [¶] It is not our task to weigh conflicts and disputes in the evidence; that is the province of the trier of fact. Our authority begins and ends with a determination as to whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, in support of the judgment." (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 630-631.)

Here, the court found a contract existed between the parties whereby defendant promised to cash the check for plaintiff in exchange for plaintiff's agreement that defendant could keep a portion of the proceeds equal to the auction value of equipment defendant bought for the business. This agreement contained the essential elements of a contract: "1. Parties capable of contracting; 2. Their consent; 3. A lawful object; and, 4. A sufficient cause or consideration." (Civ. Code, § 1550.) Substantial evidence supported the court's finding: Plaintiff testified defendant agreed to cash the check for her and pay her the money in two weeks; defendant testified she bought equipment for the bakery with the expectation she would be paid back upon the sale of the business. As to plaintiff's written authorization to the escrow company stating she was repaying defendant's loan to her, the court obviously believed plaintiff's testimony she merely copied defendant's writing without really understanding the contents.

(Moreover, the document was marked for identification as Exhibit 45, but the record supports plaintiff's assertion it was never admitted into evidence.)

Although defendant does not say so, it appears her main contention is that a variance existed between plaintiff's pleading that she lent defendant the money and her proof adduced at trial. But "[n]o variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." (Code Civ. Proc., § 469.) "Where the variance is not material, as provided in Section 469 the court may direct the fact to be found according to the evidence . . . ." (Code Civ. Proc., § 470.) "Code of Civil Procedure section 469 . . . precludes a party from complaining about a variance between the pleadings and the proof at trial for the first time on appeal *when there was no objection lodged at trial* . . . ." (*Schweitzer v. Westminster Investments, Inc.* (2007) 157 Cal.App.4th 1195, 1214.) Defendant alleges plaintiff "at no time[] either before or during trial sought leave of court to amend [her] complaint," but never asserts she (defendant) ever objected at trial to the variance. Nor was defendant prejudiced by the pleading: Plaintiff's theory at trial was that she asked defendant to hold the money for her; defendant's defense was predicated on her assertion plaintiff owed her the money in repayment for equipment purchases she had previously made; and the court's finding took into account both parties' positions. (*Howard v. D.W. Hobson Co.* (1918) 38 Cal.App. 445, 451-452 ["The difference thus arising between the agreement declared upon and the evidence and the findings could not have misled the defendant to its prejudice in maintaining its defense upon the merits, and, therefore, the variance, if variance there be, is immaterial and cannot be made to operate to overthrow the judgment"].)

Because we affirm the judgment on the breach of contract cause of action, we need not address defendant's challenge to the court's ruling on the money lent claim.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.